2004

Book Review. Affirmative Action and Racial Preference by Carl Cohen and James P. Sterba

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Carl Cohen/James P. Sterba, Affirmative Action and Racial Preference, Oxford: Oxford University Press, 2003, 394 pp.

The morality of affirmative action has been sharply debated in America for more than twenty-five years. Neither side has managed to gain a clear upper hand. The recent book, "Affirmative Action and Racial Preference," by Professors Carl Cohen and James P. Sterba, contains an impressive and interesting contribution to the debate by two renowned American philosophers. Professor Cohen, who teaches philosophy at the University of Michigan and was directly involved in the latest round of litigation over the issue in the United States Supreme Court, argues against what he calls "racial preference" (according to Professor Cohen's chosen terminology, this is a particular subset of the larger category of "affirmative action"). Professor Sterba, who teaches philosophy at the University of Notre Dame, argues broadly in favor of affirmative action. Their arguments are well-stated, and the careful reader will come away with a better understanding of the legal, ethical, and practical dimensions of the debate.

It is in the nature of such closely matched debates that the disagreement between the two sides, no matter how seemingly complex and multi-faceted, often comes down to a few simple, subtle differences of opinion about one or more of the underlying premises of the argument. And so it is with the debate between Professor Cohen and Professor Sterba. The essence of their debate, it seems, lies in the following question: Is it morally permissible (or even morally required) to re-allocate societal resources from the members of one group to the members of another group within that society, so long as one can be certain that many (or most) of the members of the first group have suffered from past societal deprivations, and so long as one can be certain that many (or most) of the members of the second group have benefited from the same societal deprivations that adversely affected the members of the first group?

The contours of the problem can be illustrated by a simple example. Let us imagine the existence of a small society consisting entirely of members of two groups, a majority group (Group A) and a minority group (Group B). These two groups are defined on the basis of some immutable characteristic that is completely unrelated to merit or desert; for present purposes, let us say that it is the natural color of one's hair, so that all persons who are blond or red-headed belong to Group A, and all persons who have darker hair are in Group B. Group A consists of ten persons, while Group B consists of five persons.

One day, we learn that there has been a series of thefts perpetrated in the recent past against some of the members of Group B. Because the members of Group B are not careful about accounting for their money, we cannot be certain exactly who was victimized by these thefts. But upon investigation, we can determine that the total number of victims was four (i.e., all except one member of Group B), and the total amount of money stolen was substantial: $45,000 per victim, for a total loss of $180,000.

Let us further imagine that we cannot determine exactly who committed these thefts. But upon investigation, we can determine that all of the thefts were committed by a gang consisting of nine unidentified blond-haired or red-haired persons (i.e., all except one member of

Group A), and the stolen money was evenly distributed among them, so that each member of the gang received $20,000.

Thus, although we cannot say exactly which members of Group A were the thieves, nor exactly which members of Group B were the victims, we can say that the members of Group B, in the aggregate, are less wealthy in the amount of $180,000, while the members of Group A, in the aggregate, are more wealthy in the same amount, because of an involuntary and undeserved (indeed, criminal) transfer of a total sum of $180,000 from most of the members of Group B to most of the members of Group A.

Based on these hypothetical facts, is it morally permissible (or even morally required?) to take $180,000 equally from the ten members of Group A (or $18,000 per member), and reallocate that money equally to the five members of Group B (or $36,000 per member), in order to compensate, albeit inexactly, for the past thefts? The primary goal of such a strategy, of course, would be to deprive the nine gang members in Group A of most of the ill-gotten gains of their thefts ($18,000 out of $20,000), and to restore to the four victims in Group B most of their stolen money ($36,000 out of $45,000). But the one innocent member of Group A would also be made poorer by $18,000, without any real justification, and the one non-victimized member of Group B would also be made richer by $36,000, again without any real justification.

Is such a strategy morally defensible? Although they do not address this particular hypothetical in the book, Professor Sterba would probably answer, "yes," while Professor Cohen would certainly answer, "no." And this basic difference seems to lie at the core of their differing points of view about affirmative action and racial preference.

According to Professor Cohen:

> "The moral blindness of race preference is exhibited from both sides: the wrong people benefit, and the wrong people pay the price of that benefit." [p. 27]
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> "Race preference gives rewards to some persons who deserve no rewards at all, and is thus over-inclusive." [p. 27]
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> "Even if those receiving race preference now had been injured earlier because of their race, it is plainly false to suppose that those over whom they are now preferred were in any way responsible for the earlier injuries." [p. 33]

In other words, Professor Cohen has a fundamental moral objection to any affirmative action program that grants racial preference, so long as such a program both benefits and burdens individuals who were not involved directly in past discrimination.

Professor Sterba fundamentally disagrees:

> "But there are other forms of [appropriate] remedial affirmative action in which the individuals who benefit are not the ones who were actually discriminated against by the institution that is providing the remedial affirmative action." [p. 208]
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> "The past discrimination that is to be remedied must be proven discrimination, but the institution that is engaging in the affirmative action need not be implicated in that proven discrimination in order for the affirmative action in question to be justified." [p. 233]
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> "[I]t should be the case that those who are passed over by such programs have themselves benefited from the discrimination suffered by these affirmative action candidates ...; [but] if someone passed over by an affirmative action program could make the case that he or she had not benefited from the discrimination suffered by the relevant affirmative action candidates (some-

thing it would be very difficult to do in the United States given its level of racial and sexual discrimination), that would have to be taken into account." [p. 232 & fn. 42]

In other words, Professor Sterba sees no moral requirement that the individuals who benefit from affirmative action must be the same ones who suffered from past discrimination, nor that the institution implementing the affirmative action be implicated in such past discrimination. And although he seems to agree with Professor Cohen, in theory, that only those individuals who have benefited from past discrimination should be burdened by affirmative action, he also places on such individuals the burden (probably insurmountable, in his view) of proving their innocence – which would mean that, on the hypothetical facts described above, the lone innocent member of Group A would lose, and would be forced to pay $18,000 in compensation.

This fundamental moral dilemma is bad enough. But in the real world, of course, the situation is not even as clear or simple as in the hypothetical world above, which further complicates the moral calculus. First, there is the empirical problem. In the real world, as in the hypothetical world, it is impossible to tell exactly who has benefited from past racial discrimination and who has been victimized. But in the real world, it is also impossible to tell how many perpetrators and victims there are, or what percentage of the total relevant population they represent. And it is also impossible to determine, with any degree of accuracy or confidence, the total magnitude of the benefits and losses produced by racial discrimination. Without such information, the affirmative action strategy necessarily becomes less precise, and hence harder to defend.

Second, there is the generational problem. The perpetrators of the worst forms of racial discrimination in American history – slavery, Jim Crow-era lynchings, chain gangs – are mostly dead and gone, and so are their direct victims. Overt racial discrimination in such areas as employment, housing, education, and public accommodations, likewise has become primarily a thing of the past. To the extent that affirmative action is designed to compensate (in part) for the lingering effects of these past societal deprivations, the remedy, no matter how narrowly tailored, burdens (and benefits) not those who engaged in (or suffered from) such morally indefensible acts, but their descendants. The "sins of the father" are visited, in effect, on the sons and daughters of those responsible for committing the sins.

Professor Sterba points out, of course, that all American blacks continue to suffer from less obvious forms of racial discrimination, while all American whites enjoy (to a greater or lesser extent) the corresponding benefits of so-called "white privilege." But in most instances, these subtler modern-day forms of disparate treatment are not consciously inflicted, which makes the moral argument for affirmative action more complicated.

Third, there is the distributional problem. In the real world, the positive and negative impacts of affirmative action are not evenly distributed throughout either black or white society. Instead, the burdens of affirmative action fall disparately on certain individual whites (such as borderline white applicants who are denied admission to elite universities), while the benefits go disparately to certain individual blacks (such as relatively well-qualified blacks who are admitted instead of the borderline white applicants). One might argue in response that affirmative action produces opportunities that are available to all blacks, even if only a small number actually take advantage of them. But this argument seems more theoretical than real, given the fact that prevailing economic and educational disadvantages render many blacks incapable of meeting the preconditions to take advantage of such affirmative action. Moreover, even at its best, such an argument addresses only half of the distributional problem.

For all of these reasons, Professor Cohen argues that affirmative action – at least the particular kind that he calls "racial preference" – cannot be justified in legal, moral, or practical terms. Professor Sterba's response consists primarily of detailing, and emphasizing, the overwhelming evidence that blacks and whites in modern America do not enjoy even remotely similar advantages or opportunities for advancement in society.

Later in the book, Professor Cohen claims to have identified the crux of the debate:

> "Behind Sterba's overall view lies an implicit remedial argument that if members of a minority were repeatedly treated unjustly, members of that minority today are entitled, all of them, to compensatory relief. Many good-hearted folks support race preference in this amiable spirit without careful reflection. Blacks in our country have been given a dreadful deal; so (the reasoning goes) let's now give blacks a somewhat-better-than-even deal. But this remedial response seems plausible only because the indirect object, "blacks," is viewed conceptually as if it were a unit, like a person who, having been unjustly deprived before, is now to be made whole by being given extra. And the burdens of that giving are mistakenly supposed to be shared by the subject, the ethnic majority treated as a unit and thought obliged to pay for the better deal to be given when in fact the burdens of preference are borne not by a mass unit but by relatively few innocent individuals."
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> "[But e]thnic groups are not persons, not moral units.... [T]he rights protected by the equal protection clause of our Constitution are individual rights. Every one of us, as an individual, is guaranteed equal treatment before the law. The fact that members of our ethnic group, whatever it may be, behaved very badly in the past cannot justify imposing a penalty upon us. The fact that members of our ethnic group, whatever it may be, were dealt with cruelly and unjustly does not entitle all in our group to recompense. It is we, as individuals, not our ethnic groups, who are the holders of moral rights and moral duties...."
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> "This is the deep root of the entire matter, and the heart of the disagreement between Sterba and me. The assumption of group rights gives rise to misunderstandings that now tear at our national fabric. At bottom it is not merely the Constitution ... or federal law ... but, underlying them, morality itself that is offended by ethnic preference. It is wrong to deal with people as though they are but tokens of a group." [pp. 292–294]

I think this is very close to, but not exactly, the true crux of the debate. It seems to me that Professor Sterba does not claim (nor does he need to claim) that all members of the generally disadvantaged minority group (in America, blacks) are "entitled" to recompense. Instead, what Professor Sterba does claim (and what he needs to claim) is that many members of the minority group are entitled to recompense, and that it is morally acceptable for some undeserving members of the same minority group to receive the same benefit not because they are "entitled" to it, but because this is the only practical way to accomplish the primary goal of compensating those who are.

Similarly, Professor Sterba does claim (as he needs to claim) that it is morally acceptable for affirmative action remedies to burden some "innocent" individuals who cannot prove that they did not benefit from past discrimination – again, not because they deserve to be so burdened, but because this is the only practical way to achieve the primary goal of remedying past discrimination.

These two claims – and not the claim of "group rights," as asserted by Professor Cohen – seem to lie at the core of Professor Sterba's argument. Professor Cohen, in turn, rejects these two claims because he chooses to focus on the injustice of benefiting some individuals who are not entitled to it, and burdening some individuals who do not deserve it, rather than on remedying the injustice resulting from past discrimination.

There are many other issues discussed in this book, including the morality of so-called "outreach" and "diversity" affirmative action programs, and the wisdom (or lack thereof) of the United States Supreme Court's 2003 decisions in Grutter v. Bollinger (upholding the University of Michigan's holistic use of racial preferences in law-school admissions) and Gratz v. Bollinger (striking down the same university's more rigid system of racial preferences in undergraduate admissions). In the end, however, the real value of this book rests in its balanced, thoughtful, and persuasive presentation of the case for both sides of the remedial affirmative action debate. The book should be a must-read for anyone with an interest in this debate.

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Raphael Cohen-Almagor, The Right to Die with Dignity: An Argument in Ethics, Medicine, and Law, Rutgers University Press, New Brunswick, New Jersey, and London, 2001, 320 pp.

> „Death is not the worst evil; rather, when one who wants to die cannot obtain even that boon." (Sophocles, Electra, 1007).

The right to die with dignity has been debated for many years. Many crucial questions have been raised concerning ethics, morality, law and medicine. Whenever it comes to issues about a person's death, voluntary or involuntary, the judgement and consideration are often affected by emotions rather than focusing on the person's concerns or finding an adequate solution. It sometimes appears that people who ask for death with dignity are just an object in the discussion. Their wishes seem to be ignored. Self-determination, autonomy, human dignity or the meaning and value of life appear to be just words in a verbal battle – a battle where the main point of contention concerns the sanctity of life and the respect for others. Supporters and opponents alike have resorted to scare tactics to convince the public. In the end everyone has to make up his own mind, find his own way to deal with the dilemma, tolerate the other side's viewpoint and accept the decision. It is all about one question – Whose life is it, anyway?

Written from a liberal perspective, Raphael Cohen-Almagor is devoted to the formidable task of outlining ethical and legal aspects and refers to the values, beliefs and principles of the controversy while trying to prescribe guidelines and formulas for dealing with large classes of patients but stressing persistent vegetative state patients. The author relies on perspectives found across three main disciplines and several jurisdictions. The comparative study and the questioning of the ethical, medical and legal considerations of what has been experienced in other countries, e.g. the Netherlands, Israel, and the United States, is certainly one strong point of the book. The strongest point, however, is the offering of guidelines for physician-assisted suicide for specific terminally ill patients.

Cohen-Almagor, in his introduction to *The Right to Die with Dignity,* already provides a summary of the core issue opposing arguments on both sides of the controversy and thus outlining the dilemma – the autonomy and dignity of the patient versus the preservation of life by all means. The sanctity-of-life model ignores the desires of patients and refuses to acknowledge that dignity and self-determination may be relevant when it comes to ending your life. The respect-for-others argument, on the contrary, justifies the right to die due to the patient's autonomy and dignity and objects to the belief in the intrinsic value of life. Although death is a part of our existence, many jurisdictions do not recognise a right to die with dignity due to the fact that the preservation of life is one of the highest rights guaranteed by statutes,